

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

RECEIVED

In the Matter of

MAR 25 2004

Amendment of Section 73.202(b)
 Table of Allotments
 FM Broadcast Stations
 (Hart, Pentwater, and
 Coopersville, Michigan)

MB Docket No. 02-335
 RM-10545

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

To: Office of the Secretary
 Attn: Chief, Audio Division
 Media Bureau

PETITION FOR PARTIAL RECONSIDERATION

Fort Bend Broadcasting Company ("Fort Bend"), licensee of Station WBNZ(FM), Frankfort, Michigan, by its counsel, and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for partial reconsideration of the *Report and Order* in the above-captioned proceeding.¹ While Fort Bend has no objection to the grant of the petitioner's² amended proposal as ordered in this proceeding, it requests that the Commission reconsider its dismissal of Fort Bend's counterproposal. The counterproposal is technically correct and was filed according to the processing rules in effect at its time of filing. Its conflict with the petitioner's proposal was removed by virtue of petitioner's amended site. Accordingly, Fort Bend's counterproposal can and should be granted.

I. Introduction

1. Fort Bend's counterproposal was timely filed in this proceeding on December 30, 2002. The counterproposal sought to relocate Station WBNZ from Frankfort to Garfield

¹ *Hart, Pentwater and Coopersville, Michigan*, DA 04-235, 19 FCC Rcd 1886 (2004). The Federal Register publication occurred on February 24, 2004. 69 Fed. Reg. 8334.

² The petitioners are Waters Broadcasting Corp., licensee of Station WCXT, Hart, Michigan and Synergy Media, Inc., licensee of Station WWKR, Pentwater, Michigan.

No. of Copies rec'd
 List ABCDE

04

Township, Michigan and upgrade the station from Channel 275C2 to 275C1. To accommodate this upgrade, Fort Bend proposed various other changes to the FM Table of Allotments, including, *inter alia*, the substitution of Channel 287A for 227A at Glen Arbor, Michigan, and the allotment of a new Channel 227A at Frankfort, Michigan. The allotment of Channel 287A at Glen Arbor was in conflict with the original petition for rule making, which sought to allot Channel 287B at Coopersville, Michigan. Channel 227A at Frankfort was proposed in order to avoid depriving Frankfort of its only local service. Fort Bend expressed an interest in applying for and constructing a station on the new channel at Frankfort, in compliance with the Commission's rules and policies. *See Llano and Marble Falls, Texas*, 11 FCC Rcd 12647 (1996), *recon. denied*, 13 FCC Rcd 25039 (1998).

II. Discussion

2. The Commission dismissed Fort Bend's counterproposal for two reasons. First, the Commission held that Fort Bend's proposed arrangement of allotments was not a true counterproposal. The reason given was that the Glen Arbor allotment was in conflict with the *existing* arrangement of allotments as well as the *proposed* arrangement set forth in the petition for rule making. Second, the Commission held that the new Frankfort allotment was an invalid "backfill" allotment, citing its recent decision in *Application of Pacific Broadcasting of Missouri LLC for Special Temporary Authorization to Operate Station KTKY(FM), Refugio, Texas*, 18 FCC Rcd 2291 (2003), *recon. pending* ("Refugio"). However, neither of these holdings is proper in this case.

A. Fort Bend's Proposal Was a Proper Counterproposal In This Proceeding.

3. Fort Bend's Glen Arbor allotment was indeed in conflict with the current arrangement of allotments at the time of its filing. Specifically, it conflicted with Channel 287C2 at Hart, Michigan. However, the Commission is incorrect that this conflict rendered Fort

Bend's proposal an invalid counterproposal. It was a counterproposal because at the time it was filed, it was in conflict with the *proposed* arrangement of allotments. Specifically, as recited above and as noted by the Commission, it conflicted with the proposed Channel 287B at Coopersville. A counterproposal is "a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made." *Drummond and Victor, Montana*, 15 FCC Rcd 19721 (2000), citing *Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990).

4. This conflict with the proposed Coopersville allotment clearly renders Fort Bend's proposal a counterproposal. It also clearly distinguishes the two cases cited by the Commission as support for its erroneous theory. In *Ironton, Malden and Salem, Missouri*, 13 FCC Rcd 6584 (1998), the Commission stated that with respect to the proposal in question, "the conflict occurs between the current arrangement of allotments *rather than the proposed arrangement of allotments*. . . ." 13 FCC Rcd at 6584 n.2 (emphasis added). Similarly, in *Indian Springs, Nevada et al.*, 14 FCC Rcd 10568 (1999), the proposal in question was "*not in conflict with*, but rather contingent upon, the grant of the proposals under consideration" 14 FCC Rcd at 10568 n.2 (emphasis added). In each of those cases, the proposal was not in conflict with the proposed arrangement of allotments. Here, by contrast, Fort Bend's proposal *is* in conflict with the proposed arrangement of allotments. Therefore, it is a counterproposal.

5. While there was also a contingency with respect to Fort Bend's counterproposal, that contingency has been removed by an amendment to the petitioners proposal in this proceeding, which was granted. Accordingly, there is no technical impediment whatsoever to the grant of Fort Bend's counterproposal. Having granted the Coopersville allotment at the

alternate site, the Commission is no longer forced to choose between two mutually exclusive alternatives. It can grant the Fort Bend counterproposal as well.

6. Since Fort Bend's counterproposal is technically correct, it could be refiled. But requiring Fort Bend to refile its counterproposal would accomplish nothing and would be contrary to the public interest. It would require the initiation of a new proceeding with the accompanying expenditure of scarce Commission processing resources. It would delay the benefits of new service at Garfield Township, Michigan and expanded service overall. The Commission has held in similar circumstances that the public interest dictates the immediate grant of the counterproposal rather than the expense and delay of a refiling. *McCook, Nebraska, et al.*, 16 FCC Rcd 8910 (2001).

B. The Commission Should Not Apply the *Refugio* Decision To This Case.

7. The second reason given by the Commission for the dismissal of Fort Bend's counterproposal was its use of a vacant "backfill" allotment to preserve local service at Frankfort, Michigan. But in doing so, the Commission unfairly relied on a change in policy that had not been announced when Fort Bend filed its counterproposal, and is still not yet final. On February 11, 2003, more than a month after Fort Bend's counterproposal was on file, the Commission issued its *Refugio* decision,³ in which the Commission directed the staff to cease the practice of relying on vacant "backfill" allotments to preserve local service. Following the issuance of that decision, Fort Bend discussed the reasons why it should not be applied in this proceeding, but the Commission completely ignored that discussion. See Fort Bend's Supplement (filed March 31, 2003). However, it cannot simply sweep this discussion under the rug.

³ 18 FCC Rcd 2291 (2003), *recon. pending*.

8. The *Refugio* rule cannot be applied to this proceeding, for two reasons. First, doing so would violate the Administrative Procedure Act. It would impose a rule of general applicability – one which reverses longstanding and well-settled law – upon the public without giving public notice of the proposed rule and an opportunity to comment on it. Second, even if the promulgation of the *Refugio* rule were somehow within the Commission’s power, the application of the rule to pending rule making proposals filed in reliance on previous rules would give the rule an impermissible retroactive effect.

1. The “No-Backfill” Rule Violates the Administrative Procedure Act Since it Was Not Preceded by Notice and an Opportunity to Comment.

9. In order to grant a station a change in community of license, the Commission requires, *inter alia*, that the original community retain local service. *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted* in part, 5 FCC Rcd 7094 (1990). For many years, the Commission has accepted and granted petitions and counterproposals in FM and TV allotment proceedings in which this requirement is met through the addition of a new allotment, in compliance with applicable spacing rules, at the original community.⁴ The rule the Commission announced in *Refugio* – *i.e.*, the prohibition on proposing a vacant “backfill” allotment to avoid depriving a community of its sole local service – is a reversal of this longstanding practice. It is a rule of general applicability, potentially affecting the viability of numerous petitions already on file under the previous rule, as well as future proposals to amend the Table of Allotments. However, it was announced in the context of a licensing decision – specifically, a request for special temporary authority – and not in a notice

⁴ *Rangely, Silverton and Ridgway, Colorado*, 15 FCC Rcd 18266 (2000); *Refugio and Taft, Texas*, 15 FCC Rcd 8497 (2000); *Llano and Marble Falls, Texas*, 12 FCC Rcd 6809 (1997), *recon. denied*, 13 FCC Rcd 25039 (1998); *Albion, Lincoln and Columbus, Nebraska*, 8 FCC Rcd 2876 (1993), *aff’d*, 10 FCC Rcd 11931 (1995), *rev. denied sub nom. Busse Broadcasting Corp. v. FCC*, 87 F3d 1456 (D.C. Cir 1996).

and comment rule making proceeding. Notably, it is not even applicable to the licensee in that decision, since the earlier rule making was processed and granted with a vacant backfill allotment under the previous rule. *See Refugio and Taft, Texas*, 15 FCC Rcd 8497 (2000).

10. While the Commission generally is free to use agency adjudicatory processes, including licensing processes, to promulgate new rules,⁵ there are circumstances in this instance that dictate the use of rule making procedures. First, the new “no backfill” rule modifies a rule that the Commission adopted by notice and comment rule making, and agencies are not free to modify rules promulgated in that manner without invoking rule making procedures. *Molycorp, Inc. v EPA*, 197 F.3d 543, 546 (D.C. Cir. 1999). The reason for this rule is that an agency could use such a process to circumvent the notice and comment procedures mandated by the APA. *See Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997). *See also Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir 1999) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself; through the process of notice and comment rulemaking.”).

11. The former rule governing the use of new allotments as “backfills” to avoid the loss of a community’s only local service was developed over the course of numerous notice-and-comment rule making proceedings, and has been ratified by the Commission and the Court. For example, when the Commission issued a Notice of Proposed Rule Making proposing to reallocate TV Channel 8 from Albion, Nebraska to either Lincoln or Columbus, Nebraska, it also proposed the new allotment of Channel 18 to Albion to avoid depriving that community of its sole local transmission service. *Albion, Lincoln and Columbus, Nebraska*, 6 FCC Rcd 6038 (1991). The reallocation to Lincoln with the backfill at Albion was subsequently granted and affirmed by the

⁵ *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947) (“the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency”).

Commission as well as the Court of Appeals. 8 FCC Rcd 2876 (1993), *aff'd*, 10 FCC Rcd 11931 (1995), *rev. denied sub nom. Busse Broadcasting Corp. v. FCC*, 87 F3d 1456 (D.C. Cir 1996). Similarly, when the Commission proposed to delete FM Channel 284C3 at Llano, Texas, and allot Channel 285C3 at Marble Falls, Texas, it also proposed to allot new Channel 242A at Llano to avoid depriving that community of its sole local transmission service. *Llano and Marble Falls, Texas*, 11 FCC Rcd 12647 (1996) The reallocation to Marble Falls with the backfill at Llano was subsequently granted. 12 FCC Rcd 6809 (1997), *recon. denied*, 13 FCC Rcd 25039 (1998). The Commission has cited these two cases as precedent in other backfill allotment situations.⁶

12. Since the Commission developed the pre-*Refugio* backfill rule using rule making procedures, it cannot simply reverse that rule unless it uses similar rule making procedures to do so. It simply is not open to an agency to undo its duly promulgated rules without notice to the public that it is considering changing its position, and an opportunity to comment, as mandated by the APA.

13. Even if the Commission were writing on a clean slate, however (which it is not), its choice to announce a blanket rule in the context of a licensing proceeding is not unfettered. The Supreme Court has stated that "there may be situations where [an agency's] reliance on adjudication would amount to an abuse of discretion . . ." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). In that case, the Court concluded that because a general standard was not capable of being framed, there was no abuse of discretion in proceeding by a series of individualized determinations. *Id.* In this case, however, the Commission *has* framed a general standard, and has *no* need to proceed by individualized determinations. Announcing this

⁶ See, e.g., cases cited in footnote 3, *supra*.

standard in a licensing decision *could* amount to an abuse of discretion as the Supreme Court suggested.

2. Even if Validly Promulgated, The Rule Should Not be Applied Retroactively to Proposals On File Before the Rule Became Effective.

14. The Commission has the discretion to impose a new general rule in the context of a licensing decision that does not involve an FM or TV allotment rule making, as it has purported to do in the *Refugio* order. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947). The Commission even has the discretion to reverse existing law in the context of a licensing decision, and apply the new law to the parties before it. *See Retail, Wholesale and Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). However, it does not ordinarily have the ability to use that process to reverse existing law *and apply the new law retroactively* to pending cases of other parties. *See NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (noting that the application by an agency of a new rule to penalize past conduct that was permissible at the time the party acted “raises judicial hackles.”); *Retail, Wholesale and Department Store Union, supra*. “Indeed, courts have long hesitated to permit retroactive rule making and have noted its troubling nature. When parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief.” *Yakima Valley Cablevision v. FCC*, 794 F.2d 737, 745 (D.C. Cir. 1986).

15. In *Retail, Wholesale and Department Store Union*, the court identified a number of considerations bearing on the question of when a new adjudicatory decision can be applied retroactively: (1) whether the case is one of first impression; (2) whether the new rule is an “abrupt departure from well established practice”; (3) the extent of parties’ reliance on the old rule; (4) the burden imposed by retroactive application; and (5) the agency’s interest in retroactive application. 466 F.2d at 390. These factors clearly militate against retroactive

application of the *Refugio* rule to parties who filed rule making proposals under the previous rule.

16. First, *Refugio* is not a case of first impression. The Commission has faced the problems associated with “backfill” allotments in previous cases. See *Citadel Communications Co., Ltd.*, 10 FCC Rcd 11910 (1995) (granting rule waivers associated with implementation of *Albion, Lincoln, and Columbus, Nebraska, supra*). Cases of second or third impression do not present nearly as compelling a case for retroactive application as cases of first impression. *Retail, Wholesale and Department Store Union*, 466 F.2d at 390. Second, the *Refugio* rule is a reversal of existing law. An agency reversing existing law does not have the same discretion in the application of that law as an agency merely clarifying uncertain law. See *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (strong presumption against retroactivity when there is a “substitution of new law for old law that was reasonably clear”). Third, parties have placed great reliance on the old rule. They have incurred legal and engineering expenses in preparation of rule making proposals, and have placed potential plans for their stations on hold while their rule making proposals have remained pending as long as two years or more. Fourth, application of the new rule would impose a burden on parties who face dismissal of their pending proposals, and for whom irrevocable changes to the spectrum may preclude development of a proposal that complies with the new rule. The burden would fall particularly heavily on counterproponents, who do not have the ability to refile in compliance with the new rule and would lose the opportunity to refile because the time for filing counterproposals has long since passed. Fifth, the Commission has little to gain from retroactive application because it has been operating under the old rule for many years and faces no regulatory or statutory deadline to make the change. In addition, the number of parties affected by retroactive application is few and

finite; as a result of the *Refugio* decision there will be no more proposed allotment backfills. The Commission even failed to consider whether the new rule should be applied retroactively, given that there was no discussion of the subject in the *Refugio* order, and this failure further argues against its retroactive application. Applying the new policy retroactively when the decision did not even discuss the question of retroactivity would be unfair and inequitable to parties such as Fort Bend.

17. The Commission's effort in *Refugio* to impose a rule retroactively also is inconsistent with past practice in the allocations rule making area. Whenever the Commission has announced rule changes in FM/TV allotment cases, previously it has done so prospectively. See e.g., *Chattahoochee, Florida and Headland, Alabama* 10 FCC Rcd 10352, 10354 (1995) ("we will henceforth require stations seeking to move from rural communities to suburban communities located outside but proximate to Urbanized Areas to make the same showing..."); *Winslow, Arizona, et al.*, 16 FCC Rcd 9551 at ¶ 9 (2001) ("we take this opportunity to advise that effective upon publication of this *MO&O* in the Federal Register, we will no longer entertain optional or alternative proposals presented in either an initial petition for rule making or in a counterproposal"); *Taccoa, Georgia, et al.*, 16 FCC Rcd 21191 at ¶ 5 (2001) ("to address these concerns, we intend to carefully review future counterproposals filed by the original rule making proponent"). None of these examples were applied retroactively to pending cases on file at the time of the decision. Similarly, the Commission must not apply the *Refugio* rule retroactively against Fort Bend, a party that filed its counterproposal in reliance upon the Commission's then existing policy.

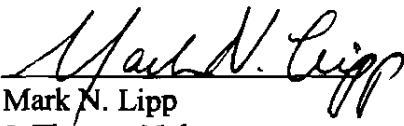
18. Finally, Fort Bend would like to point out that the Commission did say that "[h]enceforth", a community of license modification proponent may not rely on a new "backfill"

FM allotment to preserve a community's sole local service.”⁷ A reasonable interpretation of “henceforth” would be any new proposal that is filed rather than cases that have been pending for several years.

WHEREFORE, for the foregoing reasons, the Commission should reconsider that portion of its Report and Order in this proceeding dismissing Fort Bend's counterproposal, and it should grant the counterproposal.

Respectfully submitted,

FORT BEND BROADCASTING COMPANY

By: 
Mark N. Lipp
J. Thomas Nolan
Vinson & Elkins, LLP
1455 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20004-0005
(202) 639-6500

Its Counsel

March 25, 2004

⁷ Refugio, supra at p 2296.

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Vinson & Elkins, do hereby certify that I have on this 25th day of March, 2004, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Petition for Partial Reconsideration" to the following:

*

Ms. Kathleen Scheuerle
Federal Communications Commission
Mass Media Bureau
445 12th Street, SW
Washington, D.C. 20554

Matthew H. McCormick, Esq.
Reddy, Begley & McCormick
1156 15th Street, N.W.
Suite 610
Washington, D.C. 20005-1770
(Counsel to Waters Broadcasting Corp.)

Robert L. Olender, Esq.
Koerner & Olender, PC
5809 Nicholson Lane
Suite 124
North Bethesda, Md. 20852-5706
(Counsel to Synergy Media, Inc.)

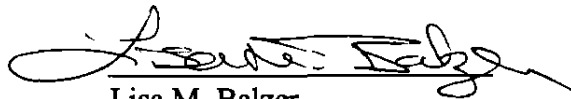
Todd D. Gray, Esq.
Dow, Lohnes & Albertson, P.L.L.C.
1200 New Hampshire Ave., NW
Suite 800
Washington, D.C. 20036-6802
(Counsel to Central Michigan University)

Dawn M. Sciarrino, Esq.
Shaw Pittman
2300 N Street, N.W.
Washington, D.C. 20037-1128
(Counsel to Steel Broadcasting, Inc.)

Dennis J. Kelly
P.O. Box 6648
Annapolis, Md. 21401
(Counsel to WATZ Radio, Inc.)

Stephen C. Simpson
1090 Vermont Avenue N.W.
Suite 800
Washington, D.C. 20005
(Counsel to George S. Flinn)

* HAND DELIVERED



Lisa M. Balzer